



## **DEPARTMENT OF TRANSPORTATION**

### **Federal Transit Administration**

**[Docket Number: FTA–2013–0019]**

### **Notice of Availability of Final Guidance on the Application of United States Code on Corridor Preservation**

**AGENCY:** Federal Transit Administration (FTA), DOT.

**ACTION:** Notice of availability of final guidance.

**SUMMARY:** The FTA announces the availability of final guidance on the application of a provision of the Moving Ahead for Progress in the 21st Century Act (MAP-21) regarding corridor preservation for future transit projects. MAP-21 modified Federal transit law by amending a previously existing provision such that FTA can now, under certain conditions, assist in the acquisition of both non-railroad and railroad right-of-way (ROW) for corridor preservation before the environmental review process under the National Environmental Policy Act (NEPA) is complete for any transit project that could eventually use that ROW or could later receive FTA financial assistance. The final guidance defines the type of ROW to which this MAP-21 provision applies and explains the conditions and requirements pertaining to its application. On December 11, 2013, FTA announced in the Federal Register under docket number FTA-2013-0019 the availability of draft guidance and requested public comment. FTA received six comment letters and presents its responses to those comments in this notice.

**DATES:** This final guidance is effective on [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**ADDRESSES:** The final guidance is available in the U.S. Government’s electronic docket site at <http://www.regulations.gov> under docket number FTA-2013-0019 and on the FTA website at <http://www.fta.dot.gov>.

**FOR FURTHER INFORMATION CONTACT:** Nancy-Ellen Zusman, Office of Chief Counsel, (312) 353-2577 or Terence Plaskon, Office of Human and Natural Environment, (202) 366-0442. FTA is located at 1200 New Jersey Avenue S.E., Washington, DC 20590. Office hours are from 9:00 a.m. to 5:30 p.m., Monday through Friday, except Federal holidays.

**SUPPLEMENTARY INFORMATION:**

**Background**

Section 20016 of the Moving Ahead for Progress in the 21st Century Act (MAP-21) amended Federal transit law by revising a pre-existing provision and moving it to 49 U.S.C. § 5323(q) such that FTA can now, under certain conditions, assist in the acquisition of non-railroad right-of-way (ROW) before the completion of the National Environmental Policy Act (NEPA) environmental review process for any project that could eventually use that ROW or later receive FTA financial assistance. The “environmental review process” is defined in 23 U.S.C. § 139(a)(3). The new provision of MAP-21, which became effective on October 1, 2012, states:

(q) CORRIDOR PRESERVATION.—

(1) IN GENERAL.—The Secretary may assist a recipient in acquiring right-of-way before the completion of the environmental reviews for any project that may use the right-of-way if the acquisition is otherwise permitted under Federal law.

The Secretary may establish restrictions on such an acquisition as the Secretary determines to be necessary and appropriate.

(2) ENVIRONMENTAL REVIEWS.—Right-of-way acquired under this subsection may not be developed in anticipation of the project until all required environmental reviews for the project have been completed.

Prior to October 1, 2012, FTA allowed this type of corridor preservation only for pre-existing railroad ROW to be used in a future transit project, pursuant to the former provision of Federal transit law that was modified and moved by MAP-21. MAP-21 removed the word “railroad” from the provision formerly in 49 U.S.C. § 5324(c) and moved it to 49 U.S.C. § 5323(q). Pursuant to authority delegated by the Secretary, FTA developed guidance that would (1) specify the conditions under which this provision may be used and (2) discuss the application of that provision to specific situations.

### **Comments**

On December 11, 2013, FTA announced in the Federal Register (78 FR 75446) the availability of the draft guidance and requested comment on it. The notice of availability of the draft guidance contained a deadline of January 10, 2014, for comment. As of the date of issuance of this notice of availability of the final guidance, FTA considered all comments received in the docket. FTA received comments from two trade associations, two transit agencies, and two members of the public. Commenters provided 21 individual comments on the draft guidance. FTA organized these comments by topic. This notice discusses the comments FTA received, provides FTA’s responses to those comments, and identifies resulting changes FTA made to the guidance.

Three commenters provided general comments that were supportive of the draft guidance and requested no changes. FTA notes these comments for the record.

Two commenters supported FTA's definition of ROW in the context of corridor preservation and thought its broad scope had advantages. FTA notes these comments for the record.

Three commenters questioned FTA's position in the draft guidance that once the environmental review of a proposed project is initiated corridor preservation would not be appropriate and FTA would not assist in any such acquisition. Commenters stated that FTA's guidance should allow ROW acquisition at any time before the completion of NEPA review. FTA considered these comments, agrees with this recommendation, and revised the guidance to reflect this. As a safeguard and to remedy any concern about prejudicing the NEPA process, FTA notes in the final guidance that a project sponsor must certify that the ROW acquisition will not limit the choice of reasonable alternatives for the project or otherwise influence the decision on any approval required for the project and would not prevent the lead agencies from making an impartial decision as to whether to accept an alternative that is being considered in the environmental review process.

One commenter questioned whether corridor preservation must be the subject of an environmental review. The commenter argued that the mere acquisition of title for corridor preservation purposes should not be subject to NEPA review at all. FTA disagrees with this argument. If an applicant acquires ROW with FTA funds, it is a Federal action. FTA and the applicant must then complete an environmental review of the acquisition itself in accordance with NEPA and all other applicable Federal

environmental laws and regulations. The ROW acquisition is treated as a stand-alone project with a separate NEPA document. If the ROW acquisition does not use Federal funds and has no Federal approvals, then NEPA would not apply to that acquisition; however, NEPA would apply to the project using that ROW itself if the project receives FTA funds.

Two commenters remarked on the appropriate level of NEPA review for corridor preservation. One stated that a categorical exclusion (CE) should be FTA's "default approach" and that approaching corridor preservation in the context of a CE would be appropriate in the vast majority of circumstances. The other commenter felt the guidance needed clarification regarding this issue. FTA does not take a "default approach" in its environmental review, for corridor preservation or otherwise. The environmental review of ROW acquisition must be completed in accordance with NEPA and all other applicable Federal laws and regulations. FTA acknowledges that the CE found at 23 CFR § 771.118(d)(4), is potentially available for the appropriate level of NEPA review for corridor preservation; FTA notes, however, that if the CE is to be used then the conditions found in Sections 771.118(a) and (b) must be met. To add clarity, FTA revised the guidance to reflect this discussion.

One commenter questioned the guidance's requirement that all FTA planning requirements be satisfied for corridor preservation, including having the project in the Transportation Improvement Program (TIP) and State Transportation Improvement Program (STIP). If ROW is acquired with FTA funds, it is a Federal action and subject to FTA's metropolitan and statewide planning requirements, meaning that the corridor preservation project must be included in Metropolitan Transportation Plan (MTP), the

TIP and STIP. Moreover, even if the property is acquired with local funds, the project should be in the MTP if it is foreseeable that FTA funds are expected to be used for the project that would use that ROW.

Two commenters submitted comments on the grants management/administration portion of the guidance. One commenter questioned FTA's expectation that a grantee implement a transit project using the ROW within a reasonable timeframe. The commenter requested FTA articulate criteria for this requirement. FTA declines to articulate specific criteria, but notes that the expectation of FTA is that when it provides Federal funds for corridor preservation that a project be built on that property within a reasonable timeframe. This is to ensure a proper and appropriate use of Federal funds. The final guidance is unchanged and states that, in determining the appropriate timeframe, FTA will consult with the project sponsor and will consider the planning status of any proposed project that would use the ROW. A second commenter questioned the guidance's requirement regarding the disposition of the ROW in accordance with 49 U.S.C. § 5334(h)(1)–(3), 49 U.S.C. § 5334(h)(4), or 49 CFR § 18.31(c). The commenter recommended FTA allow for the repayment of Federal funds when for some reason a project does not proceed as an option to avoid disposition of the ROW. One alternative disposition method involves the retention of title by the project sponsor after compensating the Federal awarding agency. This is described in FTA's Grant Management Requirements Circular (5010.1D), which sets forth all of the real property disposition requirements. See [http://www.fta.dot.gov/legislation\\_law/12349\\_8640.html](http://www.fta.dot.gov/legislation_law/12349_8640.html).

One commenter urged FTA to encourage Congress to recognize the importance of predictable funding over improved streamlining. FTA decided that this comment is outside the scope of this guidance.

The final guidance is available in the U.S. Government's electronic docket site at <http://www.regulations.gov> under docket number FTA-2013-0019 and on the FTA website at <http://www.fta.dot.gov>.

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